Tekweld Solutions, Inc. *and* Warehouse Production Sales and Allied Services Employees Union, Local 811. Case 29–RC–099621

August 15, 2014

DECISION AND DIRECTION

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on November 19, 2013, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 22 for and 21 against the Petitioner, with 30 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the report in light of the Employer's exceptions and brief, and has adopted the Acting Regional Director's findings and recommendations for the reasons that follow. In short, we conclude that the Acting Regional Director did not abuse his discretion.

As the Acting Regional Director's report explains, the Union filed its representation petition[1] on March 5, 2013.[2] On March 21, the parties entered into a Stipulated Election Agreement that provided for a voting eligibility date of March 8 and an election date of April 16. Because the Union filed several unfair labor practice charges, however, the election was not held as scheduled. After a complaint issued and a hearing on the allegations was scheduled, the parties settled the charges on August 30 and agreed that the election would be held as soon as practicable after the completion of the settlement agreement's specified notice-posting period. Ultimately, the election was held on November 19, and, as stated above, the Union prevailed by a vote of 21-20, with 30 challenged ballots.

The Board agent challenged 24 of the ballots because the voters' names did not appear on the eligibility list.[3] The Employer acknowledges that 23 of the 24 were hired after the eligibility date set forth in the Stipulated Election Agreement, but argues that the Acting Regional Director nonetheless erred in sustaining the challenges to their ballots.[4] Specifically, the Employer argues that the Acting Regional Director was obligated to revise the voting eligibility date sua sponte to accord with the revised election date. Having failed to do so, the Employer contends, the Acting Regional Director should have overruled the challenges to ballots cast by employees hired after the unrevised eligibility date. Our dissenting colleague would go further and order that a new election be conducted using an updated eligibility list. Board practice and precedent support neither result, and, in any event, the Employer failed to raise its concerns in a timely and procedurally appropriate manner.

The Board's Casehandling Manual provides that for an initial election like this one,[5] the eligibility date should normally "be the last [payroll] period ending before the Regional Director's approval of the agreement."[6] It further states that in rescheduled elections, an employer "will not be required to furnish a second list of names and addresses" absent unusual circumstances.[7] Moreover, the Casehandling Manual contains no indication that the Region should, of its own accord, change a stipulated eligibility date where the initial election has been

[1] The Union seeks to represent a unit of:

> All full-time and regular part-time printing department employees, packaging, labeling, bottle capping, warehouse employees, shipping, receiving, machine operators, and production employees employed by the Employer at its 180 Central Avenue, Farmingdale, New York location, but excluding all clerical employees, sales personnel, guards and supervisors as defined by Section 2(11) of the Act.

[2] All dates are in 2013, unless otherwise stated.

[3] The Employer challenged the remaining six ballots—those of Ana Ojeda, Alicia Benitez, Raquel Benitez, Wendy Figueroa, Osiris Canas, and Roberto A. Portillo—contending that it was investigating their eligibility to vote. Based on the parties' later agreement that those employees were eligible voters, the Acting Regional Director recommended that their ballots be counted, and no party excepts to that recommendation. Accordingly, we shall direct the Acting Regional Director to open and count those six ballots.

[4] The Union argues that Christian C. Dominguez, the 24th voter challenged by the Board agent, was ineligible to vote both because he was not on the payroll as of the eligibility date and also because he was employed by an employment agency, rather than by the Employer. The Acting Regional Director found Dominguez ineligible to vote for the latter reason. The Employer, in its exceptions, neither disputes the finding that Dominguez was employed by an employment agency nor asks the Board to overrule the precedent on which the Acting Regional Director properly relied. Thus, we adopt the Acting Regional Director's recommendation, for the reasons he stated, to sustain the challenge to Dominguez' ballot.

[5] We do not rely on Board precedent and practice regarding either rerun elections, which the Employer finds applicable, or runoff elections, which the Acting Regional Director found "instructive." The election here was neither. It was simply the initial election, albeit postponed from the date initially agreed to.

[6] See Casehandling Manual (Part Two) Representation Proceedings (Casehandling Manual) Sec. 11086.3. Consistent with that instruction, March 8, the voting eligibility date here, was the end of the Employer's last payroll period before the Acting Regional Director approved the Stipulated Election Agreement on March 21.

[7] Id. Sec. 11312.1(j). We are not persuaded that delaying the scheduled election by 7 months for the purpose of investigating, resolving, and remedying the multiple unfair labor practice allegations at issue here constitutes "unusual circumstances."

delayed due to blocking charges.[8] We find that the Acting Regional Director did not abuse his discretion by following the guidelines set forth in the Casehandling Manual, particularly absent any request by the Employer that he do otherwise.

The cases on which the Employer and the dissent rely are distinguishable. First, neither *Interlake Steamship Co.*, 178 NLRB 128 (1969), nor *Hartz Mountain Corporation*, 260 NLRB 323 (1982), involved the straightforward postponement of an initial election, as this case does. The election ordered in *Interlake Steamship* was a rerun of a runoff election (which had been set aside because of the employer's objectionable conduct), and the Board reasonably rejected the employer's unpersuasive contention that the rerun of the runoff election should use the original eligibility date simply because the original runoff election had used that date.[9] *Hartz Mountain* also involved a second election, where the initial election was nullified because the union that had prevailed subsequently disclaimed interest in representing the unit.[10] In both *Interlake Steamship* and *Hartz Mountain,* not only was the passage of time between the eligibility date and the election—over 2 years in each case—at least triple the 8 months that elapsed here, but each case also involved intervening events that reasonably warranted updating the eligibility list for the subsequent election. Accordingly, neither case constitutes persuasive precedent for changing the eligibility date in this case, let alone for ordering a new election. In any event, the Board has never set aside an election, as our colleague would, based only on challenged ballots and in the absence of a party's objections to the election.

In addition, the Employer's failure to file objections, particularly in conjunction with its failure to question the eligibility list's adequacy until 8 days after the election, limits the issues that the Employer has preserved for our consideration. As the events of this case unfolded, there were a number of occasions on which the Employer could have raised questions and concerns about the eligibility date or offered to provide a new *Excelsior* list, but it did not:[11] for instance, in mid-April, when the Employer learned that resolution of the Union's unfair labor practice charges would prevent the election from being held on schedule; in August, when the parties negotiated a settlement of the charges, including a notice-posting period that would clearly delay the election until at least November;[12] in communications with the Region in preparation for the November 19 election; and at the preelection conference on November 19. Even when the votes were counted, there is no indication that the Employer suggested that the high number of challenged ballots demonstrated that an updated list should have been used. Nor, as stated, did the Employer file objections to the election based on the assertedly outdated *Excelsior* list. Only *after* voting had closed, the tally of ballots had been completed, and the deadline for objections had passed did the Employer first contend that an updated list should have been used.[13] In these circumstances, we find that the Employer failed to raise its dissatisfaction with the eligibility date and *Excelsior* list either at an appropriate time or in a manner that would allow us to consider setting aside the election because of it.

Lest there be any doubt, we share our dissenting colleague's concern about voter disenfranchisement, and we likewise aspire to an election process that allows for broad employee participation.[14] But our precedents reflect the reality that countervailing factors, which protect the overall process, will sometimes outweigh the value of enfranchising each and every employee. Our colleague acknowledges that changes in the employee complement between a Stipulated Election Agreement's eligibility

[8] A Stipulated Election Agreement is not normally subject to change. Had the Acting Regional Director changed the eligibility date sua sponte, as the Employer contends he should have, such action could have constituted a material or prejudicial breach of the Stipulated Election Agreement warranting a new election. See, e.g., *T & L Leasing*, 318 NLRB 324, 325–326 (1995). Even rescheduling the election here was apparently done by agreement. See Acting Regional Director's Report on Challenges at 4 (in connection with settling the pending charges, "[t]he parties agreed to schedule an election as soon as practicable upon the closing of the Notice posting period defined in the Settlement Agreement").

[9] As the Employer itself argues, the Board's standard practice is to use a new eligibility list for rerun elections. See also Casehandling Manual Sec. 11452.2.

[10] Further, it is not clear whether the administrative law judge in *Hartz Mountain* raised the eligibility date sua sponte.

[11] Parties are encouraged to resolve as many voting eligibility issues as possible before the election. Casehandling Manual Sec. 11312.4. The Casehandling Manual further instructs that "[a]rrangements should be made for keeping the [eligibility] list(s) up to date, with a final check made at a preelection conference." Id. Although the Casehandling Manual suggests that "[i]f the number or nature of challenges raised is significant, consideration should be given to withdrawal of the Regional Director's approval of the election agreement," id., that option exists only if the challenges are raised *before* the election. Preelection resolution of challenges relies on the parties themselves to raise their concerns promptly, which the Employer did not do.

[12] According to the Employer, it had already hired 18 of the challenged voters before the August 30 settlement. Thus, it knew or should have known by then that the March eligibility list would omit a significant number of employees.

[13] Given the Employer's knowledge of changes to its employee complement but persistent lack of effort to prevent the voter disenfranchisement that it now protests, its belated dismay rings somewhat hollow.

[14] We do not, however, find it useful to assess the election's fairness by comparing the number of challenged voters to the number of valid votes for or against the Union.

date and the election date are often unavoidable,[15] and also that employees, along with the union and the employer, need to know who will be permitted to vote. A settled voting eligibility date also minimizes the possibility that hiring decisions will be made with an eye toward affecting the election's outcome. See *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517, 517–518 (1973), and cases cited.[16] And, as explained, the Employer took no action to seek the later-hired employees' enfranchisement before the election, or even to file objections to their disenfranchisement after the election. Thus, contrary to our colleague's view that our "overriding statutory responsibility" requires us to cure the perceived deficiency in this election by setting the election aside, our view is that the only issue properly before us is the question of whether to sustain the Board agent's ballot challenges.[17] We answer that question, in accordance with our longstanding practice and precedents and consistent with the applicable abuse-of-discretion standard, by adopting the Acting Regional Director's recommendation to sustain the challenges to the ballots of the 23 employees hired after the stipulated eligibility date.

DIRECTION

It is directed that the Regional Director for Region 29 shall, within 14 days of the date of this Decision and Direction, open and count the ballots of Ana Ojeda, Alicia Benitez, Raquel Benitez, Wendy Figueroa, Osiris Canas, and Roberto A. Portillo. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 15, 2014

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

The instant case involves a Stipulated Election Agreement, entered into on March 21, 2013, that expressly provided (i) the election would take place on April 16, 2013, and (ii) the eligibility date (when individuals must be employed to be eligible to vote) would be March 8, 2013. The March 8, 2013 eligibility date is also used to identify those employees whose names and addresses must be disclosed to the Union in the "*Excelsior* list" required to be submitted by the Employer within 7 days of the Regional Director's Decision and Direction of Election. The Union filed unfair labor practice charges against the Employer, which, under the Board's "blocking charge" doctrine, deferred the election until November 19, 2013. By then, there were substantial changes in the composition of the workforce. Ultimately, in the November 19 election, 22 employees voted for the Union, 21 employees voted against the Union, and the largest number of voters—23 employees, whose ballots were challenged—were hired after the March 8, 2013 eligibility date. These 23 voters unquestionably are in the bargaining unit, they voted, and they will be bound by the results of the election. Nonetheless, the Board directs that their votes not be counted, even though their votes outnumber both the employees whose recorded votes were in favor of the Union and the employees whose recorded votes were against the Union.

We do not know what the outcome of the election would be if the 23 votes were counted. However, I dissent from the decision not to count these votes, although I believe the proper outcome—rather than counting these votes based on a resolution of the pending challenges—is to establish a new eligibility date and to direct a new election.

Preliminarily, the Board does not guarantee that all bargaining unit employees as of the election date will be eligible to vote in an election. Rather, the Board sets an eligibility date so that all parties—employees, union, and employer—have reasonable certainty regarding who will

[15] Like our colleague, we note that our blocking charge standards are under review in our pending rulemaking process regarding the representation process. See "Representation-Case Procedures," Notice of Proposed Rulemaking, 79 Fed. Reg. 7317 et seq. (February 6, 2014). In the meantime, we apply extant law and procedure.

[16] See also *Concepts & Designs, Inc.*, 318 NLRB 948, 958 (1995) (Board agent explained that negotiated eligibility date was intended to avoid "concerns [that] an [e]mployer could pad the list with other employees . . . .").

[17] We reject, as contrary to longstanding Board practice and damaging to the representation process, our colleague's contention that a Stipulated Election Agreement becomes wholly unenforceable if the election date—or any other material term—changes. The dissent's approach would essentially require regional directors to monitor election agreements and sua sponte open them to renegotiation under a wide variety of circumstances. We decline to place those additional burdens on our regional directors.

The dissent also suggests that, because the Stipulated Election Agreement here did not expressly address a possible election postponement, the Employer cannot fairly be expected to have known that the original eligibility date would apply. We reject that claim in view of the clarity of the Board's procedure regarding rescheduled elections, counsel for the Employer's extensive experience with Board procedures, and the Employer's failure to seek clarification or offer a new *Excelsior* list. But even assuming that the Employer did not understand all the ramifications of the election agreement when it later agreed to the rescheduling of the election, we cannot excuse its failure to raise this issue prior to the election itself or in postelection objections.

participate in the election. Also, the eligibility date helps ensure that the names and addresses provided to the Union in the *Excelsior* list—which the Union can use to communicate with listed individuals—accurately identify the actual eligible voters. But there will often be some employees identified as eligible voters who subsequently become ineligible (for example, if their employment terminates before the actual election date), and there will often be some individuals who, as of the election date, are bargaining unit employees, but nevertheless are not eligible to vote (for example, because they were hired after the eligibility date). I would not change these general principles, which are important to the Board's ability to conduct elections in an orderly manner.

However, this case presents a situation where, predictably, the March 8, 2013 eligibility date would be a poor benchmark for identifying eligible voters in a postponed election that took place on November 19. In fact, "poor benchmark" has proven to be an understatement, since, as noted above, the number of challenged voters hired after March 8 outnumber both the eligible voters who voted in favor of the Union and those who voted against the Union. In the unusual circumstances presented here, I would establish a new eligibility date and direct a new election—rather than counting the 23 challenged ballots cast by voters employed after March 8—for the following reasons.

First, we cannot fairly enforce the Stipulated Election Agreement, which is the source of the March 8 eligibility date, because the same agreement specified that the election would take place on April 16. It is a black-letter principle of contract law that a party cannot selectively enforce one material term in an agreement while freely disregarding the other material terms. Nothing in the agreement addressed the possibility that the election date might change, nor did the agreement indicate, in such a circumstance, whether the eligibility date would change or remain the same. For these reasons, the Board cannot reasonably consider either party bound by the March 8 eligibility date specified in the Stipulated Election Agreement.

Second, I do not believe the Board can reasonably make the Employer or the Union responsible for the problem caused by a failure to update the eligibility date, nor do I fault the Region based on the failure to set a new eligibility date. As noted above, the Stipulated Election Agreement cannot reasonably be enforced against the Employer or the Union given the changed election date, the possibility of which is not addressed anywhere in the agreement. It is possible that the Employer or the Union could have raised a question about the eligibility date in advance of the election. There is some precedent, however, where the Board has revised and made current the eligibility date on its own initiative. See *Hartz Mountain Corp.*, 260 NLRB 323, 327 (1982); *The Interlake Steamship Co*., 178 NLRB 128, 129 (1969). Moreover, the problem in the instant case results primarily from the Board's blocking charge doctrine, which has spawned criticism and commentary to a degree that prompted the Board to solicit public input regarding potential modifications to the doctrine. See 79 Fed. Reg. 7318–7364 (2014).

Third, although I disagree with the outcome here, I cannot even fault my colleagues, who reasonably conclude we should not resolve these problems by counting the 23 challenged ballots cast by employees hired after the March 8 eligibility date. Because the eligibility date was never changed, these 23 voters were not named in the *Excelsior* list provided to the Union. Under longstanding Board law, the absence of these voters from the *Excelsior* list unfairly disadvantages the Union because it never received proper notice regarding these potential voters. (The content of *Excelsior* list disclosures is also being reevaluated as part of the pending proposed rule referenced above. Id.) There is also some reasonable basis for my colleagues' conclusion that the only matter currently pending before us involves the disputed challenged ballots, which suggests the Board could reasonably limit its review to the question of whether or not the disputed votes should be counted.

In my opinion, in an extremely unusual case like this one, and when our regular procedures have been deficient, we should satisfy our overriding statutory responsibility to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." NLRA Sec. 7, 29 U.S.C. § 157. I am not enthusiastic about causing further delay, but I believe the most appropriate action here is to set a new eligibility date and to direct a new election.

Accordingly, for the above reasons, I dissent in part.

Dated, Washington, D.C. August 15, 2014

Philip A. Miscimarra, Member

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